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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act

Competitive Bidding

PP Docket No. 93-253

To: The Commission

COMMENTS OF PAGEMART, INC.

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SUMMARY

The Commission must fashion a competitive bidding system that respects the statutory directive to serve the public interest by encouraging the development of a diverse and competitive marketplace. Achieving this objective requires that the Commission recognize that awarding licenses to the parties that value them most is not necessarily in the public interest, because of the inevitable resulting market concentration.

The auction process most likely to result in a diverse competitive market would employ sealed bids. Sealed bids eliminate at least one of the most significant advantages enjoyed by a "deep pockets" bidder in an oral auction: access to information about competitors' financial limitations. This increases the likelihood of a diverse, competitive group of companies prevailing at auction, including the small and mid-size companies that are essential to a successful marketplace and which may not qualify for "designated entity" status.

With respect to the order in which licenses are awarded, PageMart makes two suggestions. First, the Commission should permit combinatorial bidding on narrowband licenses that form logical groups. Second, the Commission should hold auctions in several rounds, separated by a

regrouping period. Both of these proposals would save time and resources, and would encourage the efficient aggregation of spectrum.

In those cases in which the licenses being auctioned are essentially homogenous, reasons of fairness and economic efficiency suggest that the price for these licenses should be determined by reference to the lowest winning bid.

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To: The Commission

COMMENTS OF Pagemart, Inc.

PageMart, Inc. ("PageMart"), by its counsel,
hereby responds to the Notice of Proposed Rulemaking
("NPRM") issued in the above-captioned proceeding.^{1/}
PageMart is a rapidly growing, innovative paging company,
dedicated to providing cutting-edge, low-cost services on a
nationwide basis. Utilizing primarily private carrier
paging ("PCP") channels, the company is a leader in the
implementation of advanced telecommunications technologies,
including narrowband personal communications services
("PCS").

I. INTRODUCTION.

In this proceeding, the Commission requests
comments on a variety of rules designed to implement the
competitive bidding authority established by the addition of

^{1/} FCC 93-455, released October 12, 1993.

Section 309(j) to the Communications Act of 1934, as amended (the "Communications Act"),^{2/} by the Omnibus Budget and Reconciliation Act of 1993.^{3/} Section 309(j) authorizes the Commission to employ competitive bidding procedures to choose among two or more mutually exclusive applications for certain initial licenses.^{4/} The Commission proposes rules regarding, inter alia, the type of bidding procedures to be employed; the order in which licenses should be offered for bid; and what preferences should be awarded to women, minorities and small businesses.

PageMart commends the Commission for its extraordinary effort in gathering and distilling the enormous amount of information contained in the NPRM within the very brief timeframe permitted under the deadlines set out in the Budget Act. It would appear, however, that in the rush to accomplish so much in such a short period of time, certain essential regulatory goals have not been paid their statutory due. In the following pages, PageMart will endeavor to re-focus the Commission's efforts on certain overarching public interest values, in order to ensure that

^{2/} 47 U.S.C. § 309(j).

^{3/} Pub. L. No. 103-66, Title VI § 6002, 107 Stat. 387 (1993) (the "Budget Act").

^{4/} This new section also limits the circumstances under which the Commission can use its existing authority to license frequencies utilizing a system of random selection. Id.

the auction procedures ultimately adopted will better reflect Congress's intent.

Specifically, PageMart urges the Commission to design the bidding process in a way that provides an opportunity for firms of all sizes to compete effectively for licenses. Sealed, rather than oral, bids should be employed for both individual and combinatorial auctions covering both broadband and narrowband PCS licenses. In the interests of efficiency and to avoid large differences in price for essentially identical licenses, such licenses should all be offered for bid simultaneously, with the price to be paid for each license equaling the lowest winning bid for a license in the group. Licenses should be awarded in descending order, arranged first by market size and then by bandwidth, with a significant breathing space between the early rounds, to permit the marketplace to respond rationally to developments. These points are discussed in greater detail below.

II. THE COMMISSION'S GOAL IN SELECTING AN AUCTION PROCEDURE MUST FOCUS FIRST AND FOREMOST ON MAXIMIZING THE LIKELIHOOD THAT A DIVERSE AND VIGOROUS GROUP OF MARKETPLACE COMPETITORS WILL EMERGE FROM THE AUCTION PROCESS.

The Budget Act and its legislative history make clear that in prescribing regulations to implement its auction authority, the Commission's focus must not be on

maximizing revenues.^{5/} While Congress certainly sought to ensure that a significant portion of the market value of the spectrum be captured for the benefit of the public through the auction process, it did not alter the basic calculus that has guided the Commission's spectrum licensing decisions since 1934: that the public interest is defined by values of a higher order than the pursuit of economic efficiencies. See generally U.S. v. Storer Broadcasting, Inc., 351 U.S. 192 (1956); National Broadcasting Co. v. U.S., 319 U.S. 190 (1943).

An open, diverse and competitive marketplace capable of ensuring universal service at reasonable rates is the overall goal historically set by the Communications Act,^{6/} and nothing in the Budget Act changed that focal point. The Commission has a statutory mandate to establish conditions likely to ensure the existence a wide range of service providers and the development and rapid deployment of new technologies.^{7/} The legislative history of the Budget Act recognizes this imperative: "the Commission's regulations must promote [competition]. . . . by avoiding

^{5/} 47 U.S.C. §§ 309(j)(7)(A); (B); H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., at 485-486 ("Conference Report").

^{6/} See 47 U.S.C. § 151.

^{7/} See id. at §§ 157, 303(g).

excessive concentration of licenses and disseminating licenses among a wide variety of applicants. . . ."^{8/}

Thus, any particular auction procedure selected in this rulemaking must focus first and foremost on the paramount objective of ensuring a diverse, competitive marketplace. If a particular auction procedure does not enhance the likelihood of achieving that goal, whatever its other virtues, that procedure should be rejected.

A. The Advantages Of Oral Auctions Identified In The NPRM Fail To Address The Primary Statutory Objective.

Despite the clear statutory imperative outlined above, the NPRM proposes a bidding system the sole virtue of which appears to be that it will award licenses to the applicants who value them most.^{9/} Pursuit of this goal is important, in the Commission's view, because:

- (1) Absent market failures,^{10/} parties that value licenses most will best serve the public and make rapid and efficient use of the spectrum;^{11/}
- (2) If the auction process does not award a license to the party that values it most, the license will

^{8/} H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 254 (1993).

^{9/} NPRM at ¶ 34.

^{10/} The Commission's proposed safeguards to deal with market failures are discussed infra.

^{11/} NPRM at ¶ 34.

ultimately be resold to that party in the "aftermarket";^{12/}

- (3) License resale may delay the provision of service to the public and deprive the Treasury of revenue that will instead go to private parties.^{13/}

The NPRM assumes that oral auctions will ensure that each license will be won by the company that values that license most highly. That may well be true, but there are few virtues to such a system. Reduced to its essentials, the party that values a license the most is the one that thinks it can realize the greatest profit in the shortest period of time. That, however, is not a definition of the public interest -- one need look no farther than the 900/976 "dial-a-porn" services for proof -- and should not form the standard against which competing auction designs are judged.

Instead, the public interest is best served by establishing conditions that are most likely to lead to a free and open competitive marketplace. Auctions are nothing more than a means for achieving this end, a tool. Of course, auctions may provide certain side benefits not offered by lotteries or comparative hearings: the economic efficiencies inherent in quickly and directly placing licenses in the hands of those who value them most, and the

^{12/} Id.

^{13/} Id.

ability of government to generate a new revenue stream. The problem with the NPRM is that it focuses almost entirely on achieving the side benefits, to the extreme prejudice of Congress' overriding purpose, a diverse and competitive market.

B. Oral Bidding Guarantees Oligopoly Control Of Markets And Risks Predatory Pricing.

By focusing on the ability of oral auctions to extract the highest possible revenues, the Commission guarantees an oligopolistic market: only a very few firms with significant financial resources ("deep pockets") will be in a position to make winning bids. Oral auctions are inherently skewed in favor of deep-pocket bidders because there is no way for parties with limited resources to disguise their bidding limits. To the extent that it wants a given license, a deep-pocket bidder can therefore use its much larger financial resources to win that license on every occasion, simply by slightly exceeding its competitor's last (best) bid. Additionally, a firm with substantial resources has both the incentive and ability to outbid a competitor even on a license it does not itself value highly, merely to deprive its competitor of that license for strategic reasons, e.g., to prevent the competitor from obtaining access to a particular market.

In short, oral bidding will virtually guarantee that licenses will end up in the hands not necessarily of those who can offer the best service, but rather in the hands of the few firms that can afford to outbid all comers.^{14/} It is difficult to see how this result serves the public interest, unless one is willing to assume that an oligopoly can be relied on to maximize consumer choices at highly competitive prices. Congress did not pin its hopes on such a revolutionary development, but instead directed the Commission to use its regulatory authority to ensure that the public interest is best served.

C. The Commission's Safeguards For Designated Entities Do Not Protect Mid-sized Companies From Being Forced Out Of The Market.

Ensuring conditions that will foster a diverse range of viable competitors truly serves the public interest. Small and medium-sized firms are a vital component of a market that operates in the best interests of

^{14/} In the case of narrowband PCS, where up to 150 kHz of spectrum may be accumulated by a single company, the 11 frequencies could be dominated by only three firms with deep pockets. In broadband PCS, a similar situation is possible: Blocks A and E could be aggregated and held by one large national consortium, Block B could be held by another national consortium, and Blocks F and G -- the 10 MHz blocks -- could even be controlled by local cellular carriers.

the public.^{15/} A range of different-sized providers guarantees robust price and service competition and shields the public against the abuses of oligopolistic power.^{16/}

The Commission's answer to the risk of market concentration is its proposal for a system of preferences for "designated entities," in what it acknowledges is an "effort to comply with its statutory mandate that it avoid

^{15/} An excellent example of this is provided by the paging industry, which is the most competitive of all of the mobile services. There, some 60% of the market is divided among over 600 companies, and even the largest possess only a small market share. A broad array of services are offered at highly competitive prices. This situation should be juxtaposed to the cellular industry, in which two licensees control each market, and in which the Commission has recognized that only the minimal levels of price and service competition exist.

^{16/} The threat of such abuse is particularly high in this case because entry barriers for new firms (acquisition of spectrum) could potentially be quite steep, rendering the otherwise potent adjustment power of the market less able to serve as a disincentive for abuse.

Moreover, it cannot plausibly be maintained that an oligopolistic market will be responsive to consumer demand for choice. For example, the broad diversity presently available in the video marketplace is the result not of the competitive efforts of the three traditional television networks, but of regulatory efforts over the past fifteen years to breaking down the barriers for entry for, *e.g.*, new cable operators and networks. The same can be said for the past decade's worth of development in the telecommunications and CPE industries. There seems to be little justification for ignoring these lessons in the instant case.

an excess concentration of licenses."^{17/} Unfortunately, the Commission's efforts fall short and fail to address the critical issue of how small and mid-sized companies that do not qualify as "designated entities" will be able to participate in the system.

Indeed, an auction design based on the Commission's assumptions about high bids and the public interest invariably will lead to a bifurcated, but remarkably homogenous, market. Such a system would assure a market comprised solely of: (1) firms with deep-pockets that outbid all competitors; and (2) "designated entities" that are able to compete by virtue of the preferential treatment they receive. No place exists in such a market for mid-sized companies, despite the fact that they are consistently on the cutting edge of technological development and pricing and service innovation.

Moreover, it is doubtful whether a successful "designated entity" bidder can truly have a marketplace impact. The concerns expressed by Commissioner Barrett in

^{17/} Section 309(j)(4)(D) of the Communications Act directs the Commission to ensure that small businesses, rural telecommunications companies and businesses owned by women and minorities are "given the opportunity to participate" in the provision of spectrum-based services. The Commission proposes to implement this directive by inter alia, deferring payment terms for small business, and providing tax certificates for business owned by women and members of minority groups. See, e.g., NPRM at ¶¶ 72-81 and note 20.

his separate statement accompanying the NPRM suggest that the limited amount of spectrum reserved for designated entities will, at best, restrict them to small niche markets.^{18/} If true, the proposed safeguards hardly represent adequate protection against oligopolistic behavior.

III. A SEALED BID SYSTEM WILL BEST SERVE THE PUBLIC INTEREST.

The starting point for devising a spectrum auction plan that advances the basic goals set out in the Communications Act must be a recognition that spectrum licenses are not just another commodity; they are impressed with a Congressionally mandated public purpose that transcends the simple allocative efficiency of the market. Spectrum licenses are neither paintings nor hog bellies. An auction format that is perfectly adequate for transferring ownership of a Monet or awarding an oil drilling lease may be inappropriate for distributing spectrum licenses in a manner that serves the public interests as specifically defined by Congress. Recognition of this distinction requires that the Commission seek an auction design that maximizes the ability of small and medium-sized companies to compete for licenses. As is demonstrated below, a variation

^{18/} See NPRM, Separate Statement of Commissioner Barrett, at 2.

on the sealed bid method is the best means of achieving this goal.

A. Sealed Bidding Eliminates The Difficulties Inherent In Oral Bidding And Minimizes The Potential For Market Concentration.

In designing the auction system, the Commission must balance three objectives: (1) the mandate to have a diverse market of service providers; (2) the need to have efficient services provided to the public; and (3) its desire to capture the economic value of the spectrum. The best way to achieve this balance is to remove the asymmetry inherent in the oral bidding system, which exposes all bidders' financial limitations.^{19/} Making information about financial limits of bidders unavailable to all parties levels the playing field, and although it does not guarantee that a medium-sized player will capture a given license, at the very least it creates the possibility that a broader range of applicants will be successful bidders.

Sealed bids require a deep-pocket bidder to estimate correctly the value that another bidder places on a license. To the extent that a deep-pocket bidder either

^{19/} The seemingly equal impact of the free availability of accurate information regarding all parties bidding constraints is illusory. Such information effectively hurts only the non-deep pocket firms. Large firms with substantial resources are not disadvantaged, because they will not be outbid by a company whose best offer does not exceed the large firm's ceiling.

miscalculates or deliberately "lowballs" its bid, the possibility that the license will go to another party is enhanced. Sealed bidding thus permits a firm with limited resources to win a license that, in an oral bid, would be virtually certain to go to a deep-pocket bidder. Licenses are awarded based solely on a firm's true estimation of the license's economic value, without the skewing effects inherent in an oral auction.

B. The Commission's Fears Regarding Sealed Bids Are Exaggerated And Are Outweighed By Their Advantages.

The Commission expresses various reservations about the use of sealed bids, most of which are illusory. More important, however, is the fact that, even if the Commission's concerns were warranted, they would be outweighed by the competitive benefits of this bidding system.

For example, the Commission expresses concern that a sealed bid auction will not award licenses to the parties that value them most.^{20/} As explained above, this critique misses the point: awarding licenses to the parties that value them most is not necessarily in the public interest. Moreover, the sealed bid system is more likely to result in bids pegged at each bidder's maximum valuation -- because

^{20/} NPRM at ¶ 41.

there is no opportunity to raise a bid -- and will increase the likelihood that a broader range of applicants are successful bidders. Although this system would not assure that the highest possible bid is received in every case, the overall benefit to the public interest will be far greater, because of the increased chance of developing a marketplace in which competition, innovation and technological advances will flourish.

The Commission also expresses concern that sealed bids could result in wild overbidding by parties that seek to guarantee that they receive a license. This criticism is unfounded. In a sealed bid auction, parties will have the opportunity to assess their options without the frenzied pace of oral bidding, making unwise decisions less, not more, probable. The value attached to a particular license may, in fact, differ substantially from company to company, resulting in a wide range of bids. This does not, however, indicate a failure of the system or that a given high-end bid is "wild." Rather, it merely suggests that the competitors have a different view of the most profitable way to use the license.

Moreover, to the extent such "overbidding" takes place, it is a necessary consequence of a system that levels the playing field by not giving deep-pocket bidders access to information about the limitations faced by other bidders.

This is also one of the system's most important advantages: with sealed bidding, if a deep-pocket bidder wishes to acquire a given license, it cannot simply do so by bidding "\$1 more" than the financial limit of a bidder with less resources.

A third concern expressed by the Commission is that a failure to extract market value for licenses will lead to aftermarket trafficking. The Commission seeks to discourage a repeat of the cellular experience, in which licenses were acquired through the lottery or comparative hearing procedures by speculators, who then profited by reselling these licenses in the aftermarket.^{21/} The Commission wishes to avoid similar transactions in the future for two reasons: (1) possible delays in service to the public; and (2) lost revenues to the Treasury.

Even if the Commission were correct in its conclusion about the risk of trafficking, neither of these possible effects outweighs the negative consequences of the market concentration that surely will occur if oral auctions are employed. In point of fact, however, there is little basis for the Commission's stated concerns.

With respect to delay in bringing service to market, the empirical evidence upon which the Commission relies does not support its conclusion. A great deal of

^{21/} Id. at ¶ 34, note 21.

cellular license trading involved constructed systems (and still does to this day, e.g., the AT&T/McCaw transaction), meaning that there was no delay in bringing service to the market, at least not a delay attributable to the aftermarket transaction in question.

As for lost revenues, these fears are misplaced for two reasons. First, if the winning bidder values a license substantially more than his competitors, his winning bid will be much higher in a sealed bid auction than in an oral auction; in the latter case, he only has to beat his competitors by a small incremental amount. Second, the Commission has grossly overestimated the likelihood of trafficking.

Trafficking will be rare because of the entry requirements proposed by the Commission for those wishing to bid at auction, whether oral or sealed bid. Put simply, the price of admission to one auction alone may be several hundred (perhaps thousand) times more expensive than what it cost to have an "application mill" prepare dozens of cellular RSA, MMDS or IVDS applications. These costs, plus the logistical costs of preparing for and attending an auction, will ensure that all but a very few auction participants (and winners) will be firms in the business of providing telecommunications services to the public, not speculators whose sole goal is to sell the license to

someone who actually wants to use it. Aftermarket transactions of the sort feared by the Commission will be the rare exception, rather than the rule.

V. THE COMMISSION SHOULD DESIGN COMPETITIVE BIDDING PROCEDURES WHICH ENSURE THAT WINNERS OF ESSENTIALLY IDENTICAL LICENSES COMPETE ON A LEVEL PLAYING FIELD.

Where substantially identical licenses are being auctioned, PageMart urges the Commission to use a variation of the sealed bid auction, the sealed second bid. The Commission tentatively concluded that it should experiment with this procedure,^{22/} the benefits of which are explored below.

It makes little economic sense for essentially identical licenses, auctioned at roughly the same time, to cost substantially different amounts. If the Commission permits such a result, it will create one of two situations: (1) the higher prices paid by some licensees will be unfairly passed on to unlucky consumers; or, (2) certain market participants will face greater difficulty earning a fair rate of return on their investment in a competitive marketplace. In either case, offering identical licenses in sequence could result in unnecessary distortions.^{23/}

^{22/} Id. at ¶ 48.

^{23/} This might not be a problem in a mature market, in which the first substantially identical licenses that
(continued...)

In order to avoid this result, the Commission should adopt a system of sealed second bids for substantially identical licenses. Under this system, the lowest winning bid for any one of the licenses would set the per-license price paid by all who won in that round.

In considering sealed second bids, the NPRM expresses concern about the potential gap between the winning and second-place bids. This concern is misplaced. The gap between winning and second-place bids should be slight in cases where there are several competitors. Moreover, a difference between the price paid and the economic value placed upon the license by the winner is a possibility inherent in any auction.

Unlike an oral auction, in a sealed second bid auction the larger bidders do not have real-time access to information about what other bidders are willing to pay. Thus, they cannot "nickel and dime" their way to a win over smaller bidders. The "gap" and its supposed consequences is a small price to pay for the diverse, competitive market that may be achieved by a sealed second bidding procedure. With sealed second bidding, the Commission will recover an

^{23/}(...continued)

are auctioned off would set the price for the remainder. Such a result, however, requires perfect knowledge and fully rational bidders. This is highly unlikely in the instant case both because this market is immature and because the bidders will be inexperienced.

amount very close to the true market value of the license, without the competitive distortions inherent in an oral auction.

VI. THE COMMISSION SHOULD PERMIT COMBINATORIAL BIDDING FOR NARROWBAND AND BROADBAND PCS LICENSES.

The Commission proposes allowing bids for groups of licenses -- "combinatorial" bidding -- in broadband PCS auctions, but does not propose to extend this option to narrowband PCS applicants. PageMart favors combinatorial bidding for logically grouped narrowband PCS channels, which would facilitate aggregation within spectrum blocks across geographic areas. Without combinatorial bidding, firms seeking to assemble regional service areas would have to painstakingly bid on each license, with no guarantee of winning all the necessary components. Providers without deep pockets would face a substantial disadvantage in assembling regional service areas due to their limited bidding budgets, and might be forced to forego bidding on these markets.

PageMart also urges that, even if the Commission chooses to utilize oral bids in other circumstances, it avoid oral bidding when licenses will be auctioned both individually and as part of a group. In such circumstances, sealed bids should be used for both the individual and the combinatorial bidding. This approach would be

administratively more efficient and would avoid a cumbersome, bifurcated process.

Without sealed bidding on individual licenses that are also offered as part of a group, the Commission would be forced to hold numerous, time-consuming, consecutive oral auctions. Worse yet, because the oral bidding would culminate in a sealed "best and final" offer, the economic effect of a bifurcated process would be almost identical to a single step, sealed bid auction.^{24/} This is true because the sealed, "best and final" offers would reflect economic values placed on the licenses by the winners, rather than market values (as with oral bidding).

VII. BIDDING SHOULD BE CONDUCTED IN SEPARATE ROUNDS, ON A GEOGRAPHIC BASIS FROM LARGEST TO SMALLEST SPECTRUM BLOCKS, WITH THE WINNERS IN EACH ROUND PAYING A PRICE EQUAL TO THE LOWEST WINNING BID RECEIVED IN THAT ROUND.

In cases involving large groups of multiple licenses -- such as are available in both broadband and narrowband PCS -- PageMart proposes that licenses be offered for bid beginning with the largest essentially identical spectrum blocks and proceeding to the smallest, moving from the largest geographic markets (e.g., nationwide) to the smallest (e.g., BTA). For example, PageMart suggests that

^{24/} PageMart's approach would eliminate the need for the individual license winners to submit a sealed "best and final" offer in competition with the combinatorial bidders. NPRM at ¶ 60.

the narrowband PCS rounds be conducted in the following order:

<u>Licensed Service Area</u>	<u>Channels Available</u>
<u>Round I</u>	
Nationwide	5 - 50 kHz paired with 50 kHz
<u>Round II</u>	
Nationwide	3 - 50 kHz paired with 12.5 kHz
<u>Round III</u>	
Nationwide	3 - 50 kHz unpaired
<u>Round IV</u>	
Regional (Grouped MTAs)	4 - 50 kHz paired with 50 kHz
<u>Round V</u>	
Regional	7 - 50 kHz paired with 12.5 kHz
<u>Round VI</u>	
Regional	2 - 50 kHz unpaired
<u>Round VII</u>	
Local (BTAs)	2 - 50 kHz paired with 12.5 kHz
<u>Round VIII</u>	
Local	8 - 12.5 kHz unpaired for use by existing paging licensees

In each round, sealed bids would be simultaneously taken on all of the licenses available for bid during that round. The price to be paid for each of the essentially identical five licenses listed above for the first round would be the lowest of the winning bids submitted for the